Supreme Court, U.S.
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No. 08-862

In The
Supreme Court of the United States

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES (AFL-CIO)),
Petitioner,

v.

ELIZABETH PICHLER, RUSSELL CHRISTIAN, SETH NYE, HOLLY MARSTON, KEVIN QUINN, JOSE SABASTRO, THOMAS RILEY, AMY RILEY, and RUSSELL DAUBERT, on behalf of themselves and those similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whereas, the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721–2725 ("DPPA"), a crime-prevention and privacy-protection statute, imposes civil liability for any knowing obtaining or use of personal information from motor vehicle records ("MVR Information"), unless it is for one of the specific purposes enumerated in section 2721, and criminal liability if the violation of the statute is "knowing"; and whereas this case arises out of Petitioner's use of MVR Information for union organizing purposes, and union organizing is not one of the permitted purposes enumerated in the statute:

1. Should the Court grant certiorari to consider whether a defendant who violates the DPPA by using MVR Information for a purpose not permitted by the statute can escape liability by also claiming a second purpose that is arguably permitted, where (a) the argument was waived because it was not briefed in any court below, (b) implying such a "safe harbor" would be contrary to the language and purpose of the statute, and (c) defendant admitted that the non-permitted purpose was its primary purpose?

2. Should the Court grant certiorari to engraft onto the statute an exception for "union organizing" that Congress did not provide for?

3. Should the Court grant certiorari to construe a statutory provision that was not the basis of the Court of Appeal's decision, and that is not the subject of a conflict of authority among the Circuit Courts?

4. Should the Court grant certiorari to engraft onto a civil liability statute a criminal *mens rea* requirement that is contrary to the statute as written and would defeat the statute's protective purposes?

5. Should the Court grant certiorari to review construction of a civil damages provision that is consistent with the statute's language and purpose, consistent with this Court's precedents, and as to which the Circuit Courts are in agreement?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

ADDITIONAL RELEVANT PROVISIONS OF THE STATUTE INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 6

A. THE THIRD CIRCUIT'S HOLDINGS ARE PLAINLY CORRECT, AND DO NOT CONFLICT WITH THIS COURT'S OR ANY CIRCUIT COURT'S HOLDINGS 7

1. The Third Circuit's "Dual Purpose" Holding Properly Effectuates The Language Of The DPPA, Is Consistent With "Mixed Motive" Cases, And Does Not Create Any Split Of Authority Among The Circuits 7

a. Because UNITE Did Not Brief Its "Mixed Motive" Argument In Either The District Court Or Court of Appeals, The Court Of Appeals Did Not Abuse Its Discretion By Deeming That Argument Waived 7

b. "Mixed Motive" Analysis Is Inapplicable To Construction Of The DPPA 9

c. UNITE Has Admitted That Its *Primary* Purpose Was Union Organizing 11

2. Certiorari Should Not Be Granted To Render An Advisory Opinion On Construction Of The DPPA's "Litigation Exception", Where The Court Of Appeals' Affirmance Was Not Based On That Exception And There Is No Conflict Of Authority Among The Circuit Courts 12

a. Petitioner Improperly Asks This Court To Review A Holding That The Third Circuit Did Not Make 12

b. The Decisions Below Were Correct, And There Is No Conflict Of Authority Among The Circuit Courts 13

3. The Third Circuit Properly Construed The "Knowledge" Requirement For Civil Liability, Despite UNITE's Attempt To Conflate That Provision With The Different Provision For Criminal Liability 15

4. The Third Circuit, Like The Eleventh Circuit, Properly Construed The Liquidated Damages Provision Of The DPPA 20

B. Petitioner Has Not Presented Issues Of Such Broad Public Importance And Unexpected Ramifications As To Warrant Certiorari Review 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Alabama v. Shelton,
535 U.S. 654 (2002) 13

Bryan v. United States,
524 U.S. 184 (1998) 16, 17

Caron v. U.S.,
524 U.S. 308 (1998) 19

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 13

Colonial At Lynnfield, Inc. v. Sloan,
870 F.2d 761 (1st Cir. 1989) 23

Commissioner of Internal Revenue v. Groetzinger,
480 U.S. 23 (1987) 10

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 28

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 10

Diamond v. Chakrabarty,
447 U.S. 303 (1980) 28-29

Doe v. Chao,
540 U.S. 614 (2004) 25-26

Fidelity Federal Bank & Trust v. Kehoe,
547 U.S. 1051 (2006) 29-30

Finkle v. Gulf & Western Mfg. Co.,
744 F.2d 1015 (3d Cir. 1984) 23

Gattis v. Snyder,
278 F.3d 222 (3d Cir. 2002), *cert. denied*,
537 U.S. 1049 (2002) 10

Irving v. Mazda Motor Corp.,
136 F.3d 764 (11th Cir. 1998) 8

Kehoe v. Fidelity Federal Bank & Trust Co.,
421 F.3d 1209 (11th Cir. 2005), *cert. denied*,
547 U.S. 1051 (2006) 20, 24, 26

Leocal v. Ashcroft,
543 U.S. 1 (2004) 20

Liparota v. U.S.,
471 U.S. 419 (1985) 20

Moskal v. U.S.,
498 U.S. 105 (1990) 19-20

National Park Hospitality Ass'n. v. Department of the Interior, 538 U.S. 803 (2003) 13

Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1988) 13

Pichler v. UNITE,
446 F. Supp. 353 (E.D. Pa. 2006), *as amended*, 457 F. Supp. 524 (E.D. Pa. 2006), *aff'd in relevant part, rev'd in part on other grnds.*, 542 F.3d 380 (3d Cir. 2008) . . . . . *passim*

Pichler v. UNITE,
542 F.3d 380 (3d Cir. 2008) . . . . . *passim*

Pichler v. UNITE,
228 F. Supp. 2d 230 (E.D. Pa. 2005), *aff'd in rel. part*, 542 F.3d 380 (3d Cir. 2008) . . 16, 19, 20

Pichler v. UNITE,
339 F. Supp. 2d 665 (E.D. Pa. 2004) 14

Priebe & Sons, Inc. v. United States,
332 U.S. 407 (1947) 23

Reno v. Condon,
528 U.S. 141 (2000) 5, 24

Rex Trailer Co., Inc. v. United States,
350 U.S. 148 (1956) 23

Rios v. Direct Mail Express, Inc.,
435 F. Supp. 2d 1199 (S.D. Fla. 2006) 17

Skretvedt v. E.I. DuPont De Nemours,
372 F.3d 193 (3d Cir. 2004) 8

Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,
525 F.3d 1107 (11th Cir. 2008) . 10-11, 13-14, 15, 17

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 8, 28

United States v. Bean,
537 U.S. 71 (2002) 8

U.S. v. Montejo,
442 F.3d 213 (4th Cir. 2006),
cert. denied, 549 U.S. 879 (2006) 17, 20

U.S. v. Thompson / Charter Arms Co.,
504 U.S. 505 (1992) 20

Wemhoff v. D.C.,
887 A.2d 1004 (D.C. App. 2005) 15

STATUTES

5 U.S.C. § 552a(g)(4) 25

18 U.S.C. § 1028(a)(1) 17

18 U.S.C. §§ 2721–2725 (Drivers Privacy Protection Act, or "DPPA") ..... *passim*

18 U.S.C. § 2721 1-2

18 U.S.C. § 2721(a) 5

18 U.S.C. § 2721(b) 5, 12, 15, 24

18 U.S.C. § 2722 18

18 U.S.C. § 2723 ..... 18, 20

18 U.S.C. § 2724 ..... *passim*

42 U.S.C. § 2000e-2(a)(1) 9

42 U.S.C. § 2000e-2(m) 10

RULES

Sup. Ct. R. 10(a) 13, 14

OTHER

E. Gressman, K. Geller, *et al.*, SUPREME COURT PRACTICE (9th ed., 2007) 12, 14

Restatement (2d) of Torts § 652H 24

Restatement (2d) of Torts § 652H, Comment *a* .. 24

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Plaintiffs-Respondents Elizabeth Pichler, Seth Nye, Kevin Quinn, Jose L. Sabastro, Thomas Riley, Amy Riley, Russell Daubert, Russell Christian, and Holly Marston respectfully file this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner UNITE HERE ("Petitioner" or "UNITE").

ADDITIONAL RELEVANT PROVISIONS OF THE STATUTE INVOLVED

In addition to those quoted by Petitioner (Petition at 2–4), the following provisions of the Drivers Privacy Protection Act may be relevant to consideration of this matter:

18 U.S.C. §2721. Prohibition on release and use of certain personal information from State motor vehicle records

. . .

(a) In general.--A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual

obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): ...

(b) Permissible uses.--Personal information referred to in subsection (a) ..., subject to subsection (a)(2), may be disclosed as follows:

. . .

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self- regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

. . .

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

STATEMENT OF THE CASE[1]

This case arises out of UNITE's ongoing campaign to unionize Cintas Corporation. (Petition at 4–5, 14) As one of its methods, UNITE visited workers at their homes, to "discuss [workers'] experiences working at Cintas and their desire for union representation." (*Pichler v. UNITE*, 446 F. Supp. 353, 362 (E.D. Pa. 2006), *as amended*, 457 F. Supp. 524 (E.D. Pa. 2006), *aff'd in relevant part, rev'd in part on other grnds.*, 542 F.3d 380 (3d Cir. 2008), Pet.App. C at 89a [quoting UNITE officer] In those conversations, UNITE organizers sought to gauge interest in the union, and get workers to sign cards expressing their interest in unionizing. They also sought to dig up any issues, legal or otherwise, around which to agitate as part of UNITE's campaign. (*Id.*; Jt.App. 949 ¶18) UNITE admitted that its efforts to find and dig up claims "was part and parcel of its union organizing campaign ..." (UNITE 3d Cir. Br. at 32; *see also, Pichler*, Pet.App. A at 3a, 542 F.3d at 383.)[2] Indeed, UNITE itself argued that its supposed litigation efforts "could not be severed from" its union organizing campaign. (Pet.App. A at 31a–32a; 542 F.3d at 395)

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[1] References to "Pet.App." are to the Appendices to UNITE's Petition. References to "Jt.App." are to the Joint Appendix filed in the Third Circuit.

[2] UNITE stipulated that its pursuit of litigation was merely a tactical component of its organizing campaign (Jt.App. 226, ¶21). UNITE's Vice President of Organizing admitted that "Sponsoring or hunting ... or digging up litigation ... is a corporate [organizing] campaign tactic, ..." (Jt.App. 1563 [at 201]).

To obtain the names and contact information of as many workers as possible "to contact at home as part of UNITE's Cintas campaign," in addition to several other available methods, UNITE used license plate numbers to access personal information from state motor vehicle records ("MVR") of persons whose automobiles it found in Cintas parking lots (called "tagging"). (*Pichler*, Pet.App. C at 79a-80a, 446 F. Supp. at 358 [*quoting* parties' Joint Stipulation]) UNITE stipulated that it used tagging "to contact workers as part of UNITE's organizing campaign" (Pet.App. C at 102a, 446 F. Supp. 2d at 367 [*quoting* parties' Joint Stipulation]). The true motivation for UNITE's instant Petition is that "For years, unions have used MVR information to identify and contact workers to discuss their rights to organize." (Petition at 5) A UNITE officer declared that "UNITE's ability to carry out its purposes will be significantly affected if it is unable to utilize motor vehicle information to assist its campaigns against employers like Cintas that ardently oppose unionization." (Jt.App. 968, ¶29)

"Tagging" is imprecise. When UNITE obtained a name and contact information from MVR, it did not know anything about that person — not even if they were actually employed by Cintas. (*Pichler*, Pet.App. C at 89a, 446 F. Supp. 2d at 362.) Indeed, Plaintiffs Christian, Marston, and Amy Riley are not employed by Cintas. (Pet.App. C at 86a, 446 F. Supp. 2d at 360-61)

"Tagging" also ignores the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721–2725 ("DPPA"). The DPPA was enacted in 1994 by a Democratic Congress, and signed by a Democratic President, as a joint crime-prevention and privacy-protection statute. The DPPA

broadly prohibits *all* obtaining and use of personal information from motor vehicle records *except only* those uses *specifically enumerated* in 18 U.S.C. §2721(a) and (b). Notably, the purposes for which MVR information are used do not have to be unlawful or otherwise improper in order to violate the DPPA — the use itself is a violation if not expressly permitted.[3] Union organizing — or, in UNITE's formulation, "identify[ing] and contact[ing] workers to discuss their rights to organize" (Petition at 5) — is not among the purposes expressly permitted by section 2721.[4]

UNITE knew all about the DPPA. In 2000, UNITE was sued for violating the DPPA, and settled the case. (Pet.App. A at 10a fn.8, 542 F.3d at 387n.8; Pet.App. C at 93a-94a, 446 F. Supp. 2d at 364.) Despite this warning, UNITE continued its large-scale tagging activities against Cintas and other target companies — because UNITE believes tagging to be "'a valuable tool ... in organizing workers.'" (Pet.App. C at 95a, 446 F. Supp. 2d at 364-65 [*quoting* UNITE officer]).

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[3] This evidences Congress's concern for protection of privacy in its own right. That concern is further demonstrated by the fact that Congress made clear that MVR information could not be used for bulk solicitations unless the individual expressly consented to such use. *See* 18 U.S.C. §2721(b)(11) and (12). *See generally, Reno v. Condon*, 528 U.S. 141, 144-45 (2000) (noting that one concern of Congress was the sale of motor vehicle information for commercial use).

[4] It is not correct, as Petitioner implies (Petition at 5n.2, that the use of MVR for union organizing has been approved by both the NLRB and the Courts. Two of the decisions Petitioner cites *pre*-date the DPPA, and none of those decisions considers the impact of the DPPA on this union organizing tactic.

REASONS FOR DENYING THE PETITION

UNITE's Petition should be denied for at least five separately sufficient reasons. Fundamentally, UNITE seeks to ask this Court to re-write the DPPA to engraft an exception, for union organizing activity, that Congress did not choose to provide. The relief that UNITE seeks is properly addressed to the legislative branch, and not to this Court.

Second, while the Third Circuit correctly held that UNITE's admitted purpose of union organizing violated the DPPA, UNITE seeks reversal based on a "mixed motive / primary purpose" analysis that UNITE never briefed in either court below, and raised for the first time only at oral argument in the Court of Appeals. The question of whether the Court of Appeals *abused its discretion* by not considering an argument that had not been briefed and was thus waived is not one that merits certiorari review.

Third, UNITE seeks an *advisory* construction of the statute that was not even the basis of the Third Circuit's decision. Thus, while UNITE argues that the *District* Court construed the litigation exception to the DPPA too narrowly, the Court of Appeals neither adopted nor relied on that construction in affirming the judgment against it. Nor is there any conflict of Circuit Court authority between the Eleventh Circuit's *obiter dicta* on, and the Third Circuit's non-construction of, the litigation exception.

Fourth, UNITE's arguments lack substantive merit. The decisions from which it seeks discretionary review were based on standard rules of construction and applicable caselaw properly applied to the

language and structure of the statute as crafted by Congress. Petitioner, by contrast, distorts the language of the statute and relies on cases that construed statutes with materially different language, in order to defeat the statute's purpose.

Lastly, the Petition is premature in any event, because the Third Circuit remanded the case for further proceedings which have yet to be had.

In short, the Petition should be denied because it seeks to create a precedent that is both unnecessary and erroneous.

A. THE THIRD CIRCUIT'S HOLDINGS ARE PLAINLY CORRECT, AND DO NOT CONFLICT WITH THIS COURT'S OR ANY CIRCUIT COURT'S HOLDINGS

1. The Third Circuit's "Dual Purpose" Holding Properly Effectuates The Language Of The DPPA, Is Consistent With "Mixed Motive" Cases, And Does Not Create Any Split Of Authority Among The Circuits

a. Because UNITE Did Not Brief Its "Mixed Motive" Argument In Either The District Court Or Court of Appeals, The Court Of Appeals Did Not Abuse Its Discretion By Deeming That Argument Waived

UNITE asks this Court to grant certiorari with respect to an issue it did not argue or brief, nor cite any of the cases it now cites, in either court below.

What UNITE did argue was that if it had "at least one" purpose that was permitted, that would immunize it from liability for a non-permitted purpose; in other words, that any permitted purpose would act as a "safe harbor", regardless of UNITE's admission that it also used MVR information for a purpose that was not permitted. *See Pichler*, Pet.App. C at 100a, 446 F. Supp. 2d at 367. Petitioner did not argue "mixed motive" nor cite any cases relevant to mixed motive in the District Court. Nor did Petitioner argue mixed motive or cite cases relevant thereto in the Third Circuit, despite the District Court's plain holding that its use of MVR information to further its organizing campaign subjected it to liability under section 2724(a).[5]

The general rule is that arguments not briefed are waived. *E.g.*, *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 202-03 (3d Cir. 2004); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998). This Court also has held that it will not consider an issue raised for the first time in briefing on appeal to this Court. *United States v. Bean*, 537 U.S. 71, 75n.2 (2002); *see also*, *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below").

Although the Circuit Courts will, on certain narrowly defined occasions, address a pure issue of law that was otherwise waived (*Skretvedt, supra; Irving,*

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[5] Petitioner persists in arguing that the District Court's pronouncement was not a holding, but mere "*dicta*". (Petition at 18) This is refuted by the "we hold" language used by the District Court on this issue. (Pet.App. C at 102a, 446 F. Supp. at 367-68).

supra), even the dissenting Judge below acknowledged that this was committed to that court's "exercise" of "discretion". (Pet.App. A at 50a, 542 F.3d at 403 (Sloviter, J., *dissenting*).) Whether or not the Court of Appeals *abused its discretion*, in refusing to address an issue that Petitioner had never briefed and only raised for the first time at oral argument, is not a legal issue of such public importance as to warrant certiorari review.

b. "Mixed Motive" Analysis Is Inapplicable To Construction Of The DPPA

Regardless of Petitioner's waiver of this argument, "mixed motive" analysis is inapplicable to the construction of the DPPA. As Petitioner itself notes, "Mixed motive cases most often arise in the *employment* context, where *statutes* prohibit employers from terminating employees for impermissible reasons." (Petition at 15 [emphasis added]) However, this is not an "employment" case. Rather, as Petitioner also acknowledges (Petition at 14), "This lawsuit arises out of UNITE's campaign to organize workers at Cintas, ..."

Unlike the DPPA, the statutes that prohibit employment discrimination specifically contemplate a mixed motive analysis. This follows from the causation element expressed in those statutes, but which is absent from the DPPA. For example, Title VII of the 1964 Civil Rights Act makes it an "unlawful employment practice for an employer ... to discriminate against any individual ..., *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1) [emphasis added].

The "because of" language injects an express *causation* requirement into employment discrimination cases that is not present in the DPPA. Further, the 1991 Civil Rights Act codified standards for applying "mixed motive" analysis to the "because of" element of a Title VII case. *See* 42 U.S.C. §2000e-2(m). *See generally*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).[6]

Not only does the language of the DPPA not support a mixed motive analysis, but it supports the lower Courts' holdings with respect to the use of personal MVR information for two purposes, one permitted and one not permitted. Section 2724(a) expressly imposes liability for obtaining or using motor vehicle information "for a purpose not permitted under this chapter." It is the presence of a non-permitted purpose, not absence of a permitted purpose, that triggers liability.[7] Nothing in the statute provides a

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[6] The same "causation" element distinguishes cases involving peremptory jury challenges, where the issue is whether the challenge was "caused" by a discriminatory motive. *E.g.*, *Gattis v. Snyder*, 278 F.3d 222, 234 (3d Cir. 2002), *cert. denied*, 537 U.S. 1049 (2002).

UNITE's and the dissenting judge's reliance (Petition at 17) on a *dictum* in *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35 (1987), is misplaced. In *Groetzinger*, this Court construed the meaning of "trade or business" as used in certain sections of the Internal Revenue Code, and concluded that "if one's gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business within the meaning of the statutes ...." *Id.* *Groetzinger* did not engage in a "mixed motive" analysis, and sheds no light here.

[7] This is consistent with *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107 (11th Cir.

"safe harbor" if that non-permitted use is also coupled with a permitted use. Indeed, to imply such a "safe harbor" would be fundamentally absurd in light of the statute's clear (though not sole) aim to protect people from stalkers and other criminals. The decisions of the courts below were thus compelled by both the language and the purpose of the statute.[8]

c. UNITE Has Admitted That Its *Primary* Purpose Was Union Organizing

Even had UNITE not waived the argument, and even if some kind of "mixed motive" analysis were applicable to the unique language and structure of the DPPA, this case would still not present an appropriate vehicle for defining and applying that analysis. The reason is that UNITE *admitted* that its use of motor vehicle records was *primarily* for the impermissible purpose of union organizing. This is established by UNITE's own Stipulation and other affirmative admissions in the Record, as properly noted by the courts below (Pet.App. A at 32a–33a, 542 F.3d at

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2008), holding that the burden is on plaintiff to prove that defendant had a purpose that was not permitted, and not on defendant to prove the existence of a permitted purpose as an affirmative defense.

[8] The dissenting Judge's willingness to transfer mixed-motive analysis from the discrimination context to a DPPA case, in spite of and without addressing these textual and contextual difficulties, demonstrates the wisdom of not addressing an argument that has not been preserved by proper briefing. The dissenting Judge's willingness to do so was apparently motivated by her personal belief in the benefits of union organizing (Pet.App. A at 48a, 542 F.3d at 402), and not by the language of the statute.

395–96; Pet.App. C at 87a–89a, 102a, 446 F. Supp. 2d at 361–62, 367–68). Indeed, UNITE affirmatively asserted that its alleged "litigation" purpose could not be severed from, but "was inextricably intertwined with its organizing motive" (Third Circuit Opinion, *id.*), which UNITE repeats in its instant Petition (at 18).

Therefore, UNITE would be liable even under a "primary purpose / secondary purpose" analysis, and certiorari review would serve no purpose. *E.g.*, E. Gressman, K. Geller, *et al.*, SUPREME COURT PRACTICE (9th ed., 2007), at 248 (certiorari will be denied where resolution of issue will not change result reached below).

2. Certiorari Should Not Be Granted To Render An Advisory Opinion On Construction Of The DPPA's "Litigation Exception", Where The Court Of Appeals' Affirmance Was Not Based On That Exception And There Is No Conflict Of Authority Among The Circuit Courts

a. Petitioner Improperly Asks This Court To Review A Holding That The Third Circuit Did Not Make

Remarkably, UNITE asks this Court to grant certiorari in order to render an *advisory* opinion as to the proper construction of 18 U.S.C. §2721(b)(4), the "litigation exception" to the DPPA — even though the Court of Appeals did *not construe* that provision nor base its affirmance upon it. *See* Pet.App. A at 31a, 542 F.3d at 395 ("We *need not address* the District Court's

interpretation of the litigation and the acting on behalf of government exceptions as we agree with the District Court that ... 'The act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose.'" [Emphasis added]). It is a cardinal tenet of American jurisprudence that Courts will not provide advisory opinions on matters not in fact in controversy.[9] As this Court observed in a slightly different context, "We shall deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988). The Court should not grant certiorari to review a decision that the Court of Appeals did not make.

b. The Decisions Below Were Correct, And There Is No Conflict Of Authority Among The Circuit Courts

Not only does Petitioner seek an advisory opinion, but there is also no conflict of authority among the Circuit Courts that this Court need resolve. *Cf.* SUP. CT. RULE 10(a). As noted, the Third Circuit did not rule on the District Court's construction of the litigation exception, expressly affirming the judgment of the District Court on a different ground. On the other hand, the statement of the Eleventh Circuit in *Thomas, supra*, relied on by UNITE and the dissenting Judge, was a *dictum* as to an issue that court did not resolve, having ruled such issue waived. *Id.*, 525 F.3d

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[9] *E.g.*, *National Park Hospitality Ass'n. v. Department of the Interior*, 538 U.S. 803, 811 (2003); *Alabama v. Shelton*, 535 U.S. 654, 676 (2002); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) (citing cases).

at 1115n.5. *Cf. Pichler*, Pet.App. A at 32a fn.18, 542 F.3d at 395n.18. That *dictum* does not constitute legal "authority". The *obiter dictum* on an issue of one court and the express non-resolution of that issue by another court cannot constitute a "conflict of authority" among the Circuit Courts that this Court need resolve.[10]

Not only is there no *authority* in conflict, it is also significant that the *Thomas* decision involved facts materially different from those present here, so that even if the decisions there and below could be deemed "authority" as to the scope of the litigation exception, they would still not represent a true "conflict" requiring this Court's resolution.

Thomas involved a law firm that used motor vehicle records to identify witnesses who could testify to matters relevant to existing litigation against automobile dealers. No other use of motor vehicle records was proved. This is consistent with the opinion of the District Court here (Pet.App. D at 6, 339 F. Supp. 2d at 667).

On the other hand, the case at Bar involves indiscriminate "trolling" for and solicitation of claims in pursuit of union organizing. *See* Pet.App. C at 106a, 446 F. Supp. 2d at 369 (UNITE "stipulated that they were '*finding* potential legal claims' throughout the Cintas campaign" [quoting Joint Stipulation; emphasis of the Court]). The District Court properly held that

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[10] Even if the *Thomas dictum* constituted "authority" in conflict with the District Court's decision here, a conflict between a Circuit Court and a District Court is not a basis for granting certiorari. Gressman, Geller, SUPREME COURT PRACTICE, *supra*, at 256; SUP. CT. RULE 10(a).

the litigation exception could not be stretched to cover such activity, which is more like the solicitation activity covered by the more restrictive (and therefore unavailable) section 2721(b)(12). *See also*, *Wemhoff v. D.C.*, 887 A.2d 1004 (D.C. App. 2005). To hold otherwise under the facts of this case would allow the litigation exception to completely swallow the rule, as correctly noted by both courts below (Pet.App. A at 34a fn.20, 542 F.3d at 396n.20, Pet.App. C at 106a-08a, 446 F. Supp. 2d at 369-70), and effectively grant to UNITE the "union organizing" exception that Congress plainly did not provide. *See Pichler*, Pet.App. A at 33-34a, 542 F.3d at 395-96.[11]

3. The Third Circuit Properly Construed The "Knowledge" Requirement For Civil Liability, Despite UNITE's Attempt To Conflate That Provision With The Different Provision For Criminal Liability

Section 2724(a) provides for civil liability against anyone "who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter ...." For two separately sufficient reasons, the Court should reject UNITE's request that it grant certiorari to consider UNITE's argument that, to be civilly liable under the DPPA, a defendant would not only have to

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[11] That *Thomas* does not represent an actual conflict of authority is further proven by its failure to discuss the District Court's *Pichler* decision, nor *Wemhoff*, *supra* — both of which UNITE argues must be overturned solely on the strength of *Thomas*, though *Thomas* does not even cite to, much less purport to depart from, those cases.

know that it was accessing and using MVR information, but *also* know that doing so was not permitted by the DPPA.

First, this case is not an appropriate case to review the issue. As noted *supra*, UNITE is not some innocent *naïf* caught unawares by an obscure statute of which it had no knowledge. To the contrary, UNITE was fully aware of the DPPA, since it had previously been *sued* for violating it. Thus, even if, *arguendo*, the Court were inclined to ignore the well-established adage that "ignorance of the law is no excuse" (*e.g.*, *Bryan v. United States*, 524 U.S. 184, 195 (1998)), that would not alter the outcome here, because UNITE was by no means "ignorant". As the District Court here observed, "... the knowing nature of UNITE's acts is established. Indeed, if there were ever any doubt on this subject, UNITE's participation in *Tarkington* and its resolution removes it." (Pet.App. C at 114a–15a fn.42, 446 F. Supp. 2d at 373n.42.)

Second, and in any event, the courts below properly construed the DPPA's knowledge requirement according to settled norms of construction applied to the language of the statute, in which the words "knowingly" and "for a purpose not permitted" are separated from each other by an intervening clause; so that the "knowing" requirement applies only to the immediately following *action* (obtaining and use), and not to the *subsequently* described purpose. *See* Pet.App. A at 34a-35a fn.21, 542 F.3d at n.21; Pet.App. D at 139a-140a, 228 F.R.D. at 241-42. To hold otherwise would conflict with both grammar and

caselaw.[12] Indeed, this Court has repeatedly held that, even in the criminal context, unless the statute clearly indicates a contrary intent, the word "knowing" (as opposed to "willful") refers to knowledge only of the *facts* constituting the offense, and not knowledge of the law. *E.g.*, *Bryan v. U.S.*, 524 U.S. at 192-93 ("'knowingly' does not necessarily have any reference to a culpable state of mind" [*citing* cases]). The statute here contains nothing to indicate a contrary intent.

Nevertheless, UNITE seeks to create an issue for this Court by arguing that an enhanced *mens rea* is required under the so-called "rule of lenity", incorrectly arguing that the language of section 2724 is identical to the DPPA's criminal provision, so that "knowledge" sufficient for civil liability would also impose criminal liability. But this argument is fatally flawed, because it is premised on a glaring mischaracterization of the statute. Further, the rule of lenity is a guide of last-resort that cannot be used to alter the DPPA's clear language and structure.

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[12] *E.g.*, *Rios v. Direct Mail Express, Inc.*, 435 F. Supp. 2d 1199, 1204-05 (S.D. Fla. 2006) ("under the express language of the DPPA the term 'knowingly' only modifies the phrase 'obtains, discloses, or uses personal information.' ... not ... the phrase 'for a purpose not permitted under this Chapter.'"). *Accord*, *Thomas*, 525 F.3d at 1111 ("*section 2724(a)* sets forth three elements giving rise to liability, i.e., that a defendant (1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) for a purpose not permitted"). *Cf. U.S. v. Montejo*, 442 F.3d 213, 215-16 (4th Cir. 2006), *cert. denied*, 549 U.S. 879 (2006) (construing knowledge requirement in identity theft statute, 18 U.S.C. §1028(a)(1): "as a matter of common usage, 'knowingly' does not modify the entire lengthy predicate that follows it. ... Good usage requires that the limiting modifier, ... 'knowingly,' be as close as possible to the words which it modifies, ...").

Contrary to UNITE argument, the courts below properly understood that the DPPA has *separate* criminal and civil liability provisions, so that knowledge sufficient to warrant civil liability under section 2724(a) may not necessarily be sufficient to impose *criminal* liability. Section 2723(a) provides: "A person who *knowingly violates this chapter* shall be fined under this title." [Emphasis added] By contrast, under the civil liability provision of section 2724(a), *quoted supra*, it is not necessary to "knowingly violate [the] chapter." By its plain language, the DPPA sensibly provides for a different, and lesser, level of knowledge for imposition of civil, as opposed to criminal, liability.

UNITE's reliance on section 2722 does not help it. Indeed, UNITE's assertion that section 2722 "provides for criminal liability" (Petition at 24 and 26), and the courts below thus defined the word "knowingly" differently for the statute's civil and criminal provisions, is incorrect. Section 2722(a) makes it "unlawful" for "any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted by section 2721(b) ..." However, "unlawful" does not necessarily mean "criminal", and section 2722 does not impose any penalty whatsoever. Rather, criminal penalties are imposed by section 2723 (criminal fine), while civil damages and injunctive relief are provided by section 2724.[13] As noted, the clear language of section 2723

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[13] Whether the Justice Department may enforce violations of section 2722(b) (Petition at 25) is irrelevant. *First*, the language of section 2722(b) is very different from that of section 2724(a). *Second*, the Justice Department's jurisdiction encompasses civil, as well as criminal, actions.

provides for a significantly different — and higher — knowledge requirement than section 2724.

Section 2724(b)(2)'s provision for punitive damages "upon proof of willful or reckless disregard of the law" confirms the fallacy of UNITE's construction. Because knowledge (or reckless disregard of the fact) that the conduct is not permitted by the DPPA warrants imposition of *punitive* damages, it follows that *non*-punitive damages do not require such knowledge. The Third Circuit properly rejected UNITE's proposed contrary construction as "incomprehensible". (Pet.App. A at 36a-37a, 542 F.3d at 397.)

Even worse, the construction Petitioner urges would require that civil liability could not attach until a defendant first read the statute and consulted with an attorney in order to determine whether or not a use was "permitted" — and even then, doubt would persist, as the District Court correctly observed. (Pet.App. D at 141a; 228 F.R.D. at 242.) Such a construction has no support in legal principles or the statutory language, and would in nearly all cases nullify the statute's protections.

In the face of these overwhelming textual and common sense barriers to its position, UNITE's reliance the "rule of lenity" is unavailing. The rule of lenity is a rule of last resort in construing a statute, and does not warrant, much less require, the absurd result UNITE seeks. *See, e.g.*, *Caron v. U.S.*, 524 U.S. 308, 316 (1998) (rule "does not apply if the ambiguous reading relied on is an implausible reading of the Congressional purpose;" interpreting federal firearms statute against defendant); *Moskal v. U.S.*, 498 U.S. 105, 108 (1990) (rule reserved for "those situations in

which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute"). On the other hand, the cases relied upon by Petitioner (Petition at 26)[14] are inapposite and do not conflict with the decisions below, because they construe significantly different statutes. They stand for the "principle that 'criminal offenses requiring no *mens rea* have a "generally disfavored status."'" *Pichler*, Pet.App. D at 142a fn.29; 228 F.R.D. at 242n.29. *Cf. Montejo*, *supra*, 442 F.3d at 216 (holding rule of lenity inapplicable). Petitioner's cases have no relevance here, because criminal liability under section 2723 *does* have a clear *mens rea* requirement, while *this* case involves the separate *civil* liability provision of section 2724.

Certiorari should not be granted where the courts below properly construed the word "knowingly" according to the DPPA's clear wording and structure, and there is no conflict with this Court's precedents nor among the Circuit Courts.

4. The Third Circuit, Like The Eleventh Circuit, Properly Construed The Liquidated Damages Provision Of The DPPA

Both courts below, and the Eleventh Circuit in *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005), *cert. denied,* 547 U.S. 1051 (2006),

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[14] *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *U.S. v. Thompson / Charter Arms Co.*, 504 U.S. 505 (1992); *Liparota v. U.S.*, 471 U.S. 419 (1985).

properly construed the two clauses of section 2724(b)(1) in the disjunctive, as alternative measures of damages. Petitioner asks this Court to grant certiorari, despite the obvious lack of conflict among the Circuit Courts, to consider an arcane grammatical argument that would frustrate clear Congressional intent.

Section 2724(b) provides in full:

> "(b) Remedies. – The court may award –
>
> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
>
> (2) punitive damages upon proof of willful or reckless disregard of the law;
>
> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate."

UNITE's main argument (Petition at 29) is that "The court may award actual damages" is an *independent* clause, while "but not less than liquidated damages in the amount of $2,500" is a *dependant* clause that cannot stand on its own. The argument is erroneous because the phrase "The court may award actual damages" does not even exist as such in the statute. This is shown by both the language and also the physical structure of section 2724(b), as set forth

supra.[15] Thus the section begins with the pre-amble "The court may award –", followed by four separate categories of remedies: (1) compensatory damages with alternative measures of calculation, that is, either actual or liquidated damages of $2,500; (2) punitive damages; (3) attorneys' fees; (4) and injunctive relief.

UNITE's argument ignores the grammatical structure of the statute — including the "dash" after "may award," which Petitioner conveniently leaves out. By doing so, it is UNITE who would re-write the statute as crafted by Congress. When the provision's wording and structure — including the "dash" — are given their proper effect, the alternative or disjunctive meaning of the provision is clear:

> "(b) Remedies. – The court may award –
>
> (1) *[i]* actual damages, *[ii]* but not less than liquidated damages in the amount of $2,500; ..."

This is how both the Third Circuit and the Eleventh Circuit construed the provision, which is consistent with its language, purpose, and structure.

The courts below and the Eleventh Circuit also properly understood the significance of the provision's reference to "liquidated damages". Petitioner's attempt to narrow the meaning of that term as used in section 2724(b)(1) is unpersuasive — particularly in the context of this privacy protection statute that

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[15] UNITE itself argues that the Court must consider the "statute's text, language, punctuation, structure and subject matter." (Petition at 29)

makes unlawful a broad range of uses of MVR information which would not otherwise be unlawful *but for* the invasion of the privacy of motor vehicle records. This is very different, for example, from *Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015 (3d Cir. 1984), and *Colonial At Lynnfield, Inc. v. Sloan*, 870 F.2d 761 (1st Cir. 1989), relied on by Petitioner, which were commercial contract cases decided under state law, in which not only did the plaintiff suffer no injury, but the liquidated damages were grotesquely disproportionate because they were orders of magnitude *greater* than the $2,500 provided for by Congress here. Similarly, in *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947), this Court refused to enforce, as disproportionate, a liquidated damages clause allegedly triggered by a technical default that had no impact on the delivery of the goods in question. *Id.*, 332 U.S. at 411-13.

On the other hand, in *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956), this Court upheld liquidated damages of $2,000 per violation of the Surplus Property Act, despite the government's failure to allege specific damages (350 U.S. at 151-52), observing that "the fact that no damages are shown is not fatal." *Id.*, at 153. In light of *Rex Trailer*, moreover, the Congressionally-determined liquidated damages in section 2724(b)(1) cannot be considered "disproportionate" or a "penalty".

Unlike *Rex Trailer* and this case, none of the cases relied upon by Petitioner construed a Congressional statute. Equally important, none even remotely involved the non-commercial context in which Congress was legislating when it enacted the DPPA. Instead of proscribing use of personal motor vehicle

information for specific "harmful" or otherwise "wrongful" purposes, Congress chose to proscribe *all* uses of such information, *except* those specifically enumerated in section 2721(b). This includes, for example, otherwise innocuous uses such as bulk solicitations that would not be expected to cause any tangible harm, yet which Congress clearly proscribed and for which it clearly sought to provide a damages remedy. *E.g.*, *Reno v. Condon*, *supra*.

The construction placed on section 2724(b)(1) by the courts below and the Eleventh Circuit properly effectuates Congress's clearly expressed purpose to provide a remedy for violations of the privacy interests it was seeking to protect. This, in turn, is wholly consistent with existing legal principles concerning the remedies available for various invasions of privacy. *Restatement (2d) of Torts* § 652H and Comment *a* thereto, along with numerous cases as cited by the Third Circuit (*Pichler*, Pet.App. at 40a, 542 F.3d at 398-99), confirm that the invasion of privacy is itself an injury, for which victims are entitled to be compensated, without regard to any physical or economic injury. The Third Circuit properly agreed with the Eleventh Circuit in *Kehoe*, that liquidated damages are therefore particularly appropriate to remedy violations of privacy. *See Pichler*, Pet.App. A at 41a, 542 F.3d at 399, *quoting Kehoe*, 421 F.3d at 1213.[16]

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[16] While Petitioner deems it "ironic[]" that the Third Circuit relied on the Eleventh Circuit in *Kehoe*, which in turn relied on the District Court below (Petition at 29 and fn.8), it is precisely this *consensus* in the lower courts that militates against granting certiorari.

Nevertheless, in an attempt to create a "conflict" of authority where none exists, UNITE relies on *Doe v. Chao*, 540 U.S. 614 (2004). However, as the *Doe* Court made clear and the District Court, Third Circuit and Eleventh Circuit all properly recognized, *Doe* is inapplicable, because it involved an entirely different statute, with materially different statutory language,[17] and a materially different legislative history.

Doe construed the Federal Privacy Act, which sets forth the limited circumstances under which federal agencies waive their sovereign immunity and may be held liable for damages arising out of their intentional misuse of personal information. Central to this Court's conclusion that monetary recovery under the Privacy Act was not available in the absence of tangible injury was its interpretation of the phrases: "sustained by the individual" and "person entitled to recovery" — language that does not appear in the DPPA. The Court considered the "person entitled to recovery" language in the Privacy Act to be limiting language, and was concerned that accepting plaintiff's

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[17] The relevant text of the Privacy Act provides:

> "In any suit brought under the provisions of subsection *(g)(1)(C)* or *(D)* of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages *sustained by the individual* as a result of the refusal or failure, but in no case shall a *person entitled to recovery* receive less than the sum of $1,000; and ..." [Emphasis added]

5 U.S.C. §552a(g)(4).

argument there would read that language right out of the statute. *Id.*, 540 U.S. at 620.

At the same time, however, this Court acknowledged that language similar to that in the DPPA would accomplish the purpose of allowing a statutory minimum recovery regardless of "actual", tangible harm:

> "As Doe treats the text, Congress could have accomplished its object simply by providing that the Government would be liable to the individual for actual damages 'but in no case ... less than the sum of $1,000' plus fees and costs. Doe's reading leaves the reference to entitlement to recovery with no job to do, and it accordingly accomplishes nothing."

540 U.S. at 623. Thus, absent the "sustained by the individual" and the "person entitled to recovery" limiting language, this Court would have *agreed* that the statute provided for statutory minimum damages. Because the "critical limiting phrase" relied on by this Court in *Doe* (540 U.S. at 626) is absent from the DPPA, far from "conflicting" with *Doe*, the decisions below (and of the Eleventh Circuit in *Kehoe*), are fully consistent with, and even supported by, *Doe*'s analysis.

Because the construction of section 2724(b)(1) by the courts below *and* by the Eleventh Circuit in *Kehoe* was correct, and because it represents a consensus among the lower courts, certiorari should be denied.

B. Petitioner Has Not Presented Issues Of Such Broad Public Importance And Unexpected Ramifications As To Warrant Certiorari Review

In view of the correctness of the Third Circuit's decision and the consensus among the lower courts, UNITE has failed to establish that this case raises issues of such broad public importance as to warrant certiorari. Nevertheless, UNITE refers to the "volume and diversity of DPPA cases in recent years" (Petition at 33) in support of its contrary argument. Yet as evidence of that "volume and diversity", Petitioner points to only seven (7) cases decided by all state and federal courts combined within the past five years. (*Id.*, at 33–35) This is underwhelming — particularly so in light of the absence of serious disagreement as to the DPPA's interpretation demonstrated by those cases.

UNITE's further arguments as to the potential "chilling effect" on "persons and entities with a variety of legitimate needs" (Petition at 35) is unsupported by any evidence and wholly speculative. Nor can UNITE point to anything in the statute's language to indicate that Congress did not *want* to chill invasions of privacy into personal information that the government forces individual vehicle owners to supply.[18]

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[18] Petitioner gives as an example the possibility that a car company using personal information to contact a car owner about a safety recall (permitted) might be potentially liable for solicitation of business (clearly *not* permitted). (Petition at 35) It is significant that Congress manifested its concern that motor vehicle owners be "left alone" by strengthening the restriction against use of motor vehicle records for commercial solicitation,

To the contrary, UNITE's and the dissenting Judge's assertions that Congress "never considered" some of these issues (Petition at 35; Pet.App. A at 48a, 542 F.3d at 402), is sheer speculation. Moreover, their speculation merely confirms that they would rewrite the statute as Congress crafted it, to engraft onto it a "union organizing" exception that Congress did not put there. But this violates settled rules of construction. The courts are bound to construe statutes as written. *E.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). And as this Court has held, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW v. Andrews*, 534 U.S. at 21. There is no such evidence here.

Indeed, even if Petitioner's and the dissenting Judge's speculation were correct, they do not explain why the remedy for such lack of "consideration", if any, should lie with this Court and not with Congress itself. Certiorari should not be granted to "correct" what may be perceived to be an "error of judgment" by Congress. *E.g.*, *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) ("'[our] individual appraisal of the wisdom or unwisdom of a particular [legislative] course ... is to be put aside in the process of interpreting a statute'"

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changing it from "opt out" to express "opt in". Petitioner does not explain how using the vehicle safety exception to the DPPA's prohibitions as a cover for non-permitted commercial solicitation furthers some fundamental public policy that warrants this Court's protection.

[brackets and ellipses of the Court; citation omitted]). To the contrary, the balancing of competing societal interests is a uniquely *legislative* function (*id.*, at 317), and this Court should not grant certiorari to substitute its own judgment for that of Congress in deciding how best to balance those competing interests.

Finally, Petitioner's reliance on the opinion of Justice Scalia, joined by Justice Alito, concurring in the denial of certiorari in *Fidelity Federal Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006), is unavailing. In *Kehoe*, the State of Florida sold to a commercial solicitor the names on its motor vehicle data base, despite Congress's amendment of the DPPA to prohibit such sales except when a driver had expressly consented. Justice Scalia expressed concern that the potential liability for class actions arising out of this misfeasance by the State could amount to $40 *billion*. This was a particular concern if a defendant could "be held liable under the Act if it did not know that the *State* had failed to comply with the Act's 'express consent' requirement." *Id.* [emphasis added].

The concerns that caught the concurring Justices' attention in *Kehoe* are not present here. *First*, there is no issue here of whether Petitioner could be liable without knowing that a *State agency* had violated the law. Rather, Petitioner knowingly obtained and used MVR to further its union organizing campaign, with full knowledge of the DPPA and knowing that "union organizing" was not a "permitted purpose" under the statute. Indeed, as the District Court here noted, "Justice Scalia's concern does not touch upon our case because the knowing nature of UNITE's acts is established." Pet.App. C at 114a–15a fn.42, 446 F. Supp. 2d at 373n.42.

Second, the judgment being appealed from totals only $22,500. Moreover, the liability to the entire class has not yet been determined, so it would be premature to grant certiorari based on concern over the size of an award that has not been made. Nevertheless, the maximum potential award here is orders of magnitude *lower* than the potential that concerned the concurring Justices in *Kehoe*.

CONCLUSION

For all of these reasons, UNITE has failed to establish any compelling reason for this Court to issue a Writ of Certiorari. UNITE's Petition should be denied.

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Respectfully submitted,

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